IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 4827 OF 2004

WITH

CRIMINAL APPLNS.NOS. 4828, 4829 & 4830 of 2004

Vijay Mallya ... Applicant

versus

State of Maharashtra & anr ... Respondents

...

Mr. A.P. Mundargi, with Mr. Subodh Desai, i/by M/s. Bachubhai Munim & Co., for the Applicant.

Mr. A.S. Gadkari, A.P.P., for Respondent No.1.

Mr. P.M. Gaonkar, for Respondent No. 2.

...

CORAM : A.M.KHANWILKAR,J.

22nd December 2004

P.C.:

. Judgment was pronounced in open Court in the presence of the Counsel appearing for the parties on 14th December 2004 allowing the applications. This matter was the leading matter amongst the group of matters listed on that date

for hearing. After the matter was heard and judgment was pronounced, in the following matters, which were heard later on, certain argument was canvassed relying on the reported decisions. As those decisions were not brought to my notice at the hearing of the present applications, I thought it appropriate to inform the Advocates appearing in the present applications about the said decisions and also permit them to reargue the matter. I adopted this course as the judgment which was pronounced in open Court on 14th December 2004 was transcribed later on and yet to be signed, in view of the legal position expounded by the Apex Court in A.I.R. 1988 S.C. 371 in the case of Vinod Kumar Singh v. Banaras Hindu University and others. The Advocates were accordingly informed, who made themselves available in Chamber at 4.45 p.m. today. They agreed that the judgment, which was pronounced in open Court on 14th December 2004, need not be signed and they would reargue the matters, if placed for hearing tomorrow. Accordingly, the matters are placed for hearing on 23rd December 2004 as agreed. Ordered accordingly.

(A.M.KHANWILKAR,J.)

IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 4827 OF 2004

Vijay Mallya ... Applicant

versus

State of Maharashtra & anr ... Respondents

...

Mr. Shirish Gupte with Mr. A.P. Mundargi, with
Mr. Subodh Desai, i/by
M/s. Bachubhai Munim & Co., for the Applicant.
Mr. A.S. Gadkari, A.P.P., for Respondent No.1.
Mr. P.M. Gaonkar, for Respondent No. 2.

...

CORAM : A.M.KHANWILKAR,J.

23rd December 2004

P.C.:

01. Heard Counsel for the parties. This application is filed for quashing of criminal proceedings instituted by the Respondent No. 2 for offence punishable under section 138 read with section 141 of the Negotiable Instruments Act against the accused Company, being C.C. No.

17/SS/2004 before the Metropolitan Magistrate, 29th Court, Bhoiwada at Dadar, Mumbai. The Applicant has been named as accused No. 2 on the assertion that he is the Chairman of accused No. 1 Company. It is not the complainant's case that the Applicant was the signatory to the cheques in question. Whereas, the complaint asserts that accused Nos. 7 and 8 are the authorised signatories of accused No.1 Company and are Vice-President (Finance) and General Manager (F.M.A.) respectively of accused No. 1 Company. It is further vaguely asserted that all the accused are in charge of and responsible for the conduct of business of accused No. 1 Company. This is the only allegation on the basis of which the Applicant has been named as accused No. 2 for the alleged offence committed by the accused Company. Besides the allegations referred to above, the only other allegation in the complaint which needs to be adverted to can be discerned from para 7 wherein the complainant states that inspite of receipt of the legal notice sent to the accused, they failed and neglected to make the payment within 15 days from the receipt of the notice or till the date of the filing of the

complaint in relation to the dishonoured cheque.

02. The Applicant initially approached for recall of process before the trial Court upon receipt of the summons in relation to the said complaint. However, in view of the recent decision of the Apex Court, as recall remedy was unavailable, the Applicant has withdrawn the said application and, instead, preferred the present application for quashing of the said criminal action under section 482 of the Code of Criminal Procedure insofar as the Applicant is concerned.

03. According to the Applicant, the cheque in question was issued at a time when the Applicant was a Director/Non-Executive Chairman of the accused Company. It was a post-dated cheque in respect of loan facility extended by the Respondent No. 2 Complainant to the accused Company. According to the Applicant, he has resigned on and from 2nd April 2001 as a Director of the accused Company and that resignation has been accepted by the Board of Directors of the accused Company vide Resolution dated 30th April

2001 with effect from 2nd April 2001. It is the Applicant's case that the factum of resignation of the Applicant as Director of the accused Company has been intimated by submitting Form No. 32 to the Registrar of Companies. In other words, it is contended that when the cheque was actually presented and dishonoured and on the date when legal notice was sent, the Applicant was not concerned with the accused Company, much less as its Director in charge of the affairs of the Company, so as to make him liable in respect of the alleged offence committed by the accused Company. It is also the case of the Applicant that even on a fair reading of the complaint as a whole, there is no allegation so as to indicate the complicity of the Applicant in relation to the offence committed by the accused Company. It is submitted that even on this count, the complaint cannot proceed against the Applicant.

04. On the other hand, Respondent No. 2 has filed reply affidavit opposing this application. In the affidavit, the Respondent No. 2 Complainant has denied that the Applicant had resigned as Director, as alleged. Besides,

reliance is placed on documents to contend that the said documents would clearly establish the position that the Applicant continues to be in charge of the affairs of the accused Company even till recently; and if it is so, would be liable for offence committed by the accused Company. Insofar as the deficiency of allegations so as to indicate the complicity of the Applicant in respect of offence committed by the accused Company is concerned, according to the Respondent No. 2, if the complaint is read as a whole, necessary ingredients so as to indicate the complicity of the Applicant in respect of the offence committed by the accused Company, as is required by section 141 of the Act, are spelt out. According to the Respondent No. 2, the details to establish the said ingredients can be furnished at the trial and the complaint as filed will have to proceed even against the Applicant herein.

05. After considering the rival submissions, and going through the relevant records, the first question that needs to be addressed is : What is the purport of section 141 of the Act ? Section

138 of the Act postulates that where any cheque drawn by a "person" on account maintained by him with the banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, which is legally enforceable debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may extend to two years, or with fine which may extend to twice the amount of the cheque, or with both. The proviso to section 138 of the Act provides for three exceptions so as to extricate the person from the liability arising under section 138. Insofar as the offence under section 138 of the Act committed by a company, it is provided that "every person", who, at the time the offence was committed, was in charge of, and was responsible

to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. There are two provisos to section 141(1) of the Act. It would be apposite to reproduce section 141, as amended, in its entirety, which reads thus:

> " 141. Offences by companies.-- (1) If the person committing an offence under section 138 is a company, every person, who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:
>
> Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence.
>
> Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may

> be, he shall not be liable for prosecution under this Chapter.
>
> (2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.
>
> Explanation.-- For the purposes of this section, --
>
> (a) 'company' means any body corporate and includes a firm or other association of individuals; and
>
> (b) 'director', in relation to a firm, means a partner in the firm."
>
> (emphasis supplied)

On plain language of this provision, it is seen that even if a person is the director of the company, who is being proceeded for offence under section 138 of the Act, by itself, cannot be made liable by virtue of section 141. Something more is required to be alleged and established against that person even if he is a director. The person should be in charge of and responsible to the company for the conduct of the business of the

company at the relevant time. The expression "in charge of and responsible to the company for the conduct of the business of the company" has been considered by the Apex Court while construing provisions of the Drugs and Cosmetics Act, 1940, in the case of State of Karnataka v. Pratap Chand and others, reported in (1981) 2 S.C.C. 335, which, in turn, has referred to its earlier decision in the case of G.L. Gupta v. D.H. Mehta, reported in (1971) 3 S.C.C. 189. In para 6 of the decision in Gupta's case (supra), which has been extracted in para 7 of the decision in State of Karnataka's case (supra), the Apex Court has observed thus :

> "What then does the expression 'a person in-charge and responsible for the conduct of the affairs of a company' means? It will be noticed that the word 'company' includes a firm or other association, and the same test may apply to a director in-charge and a partner of a firm in-charge of a business. It seems to us that in the context a person 'in-charge' must mean that the person should be in overall control of the day to day business of the company or firm. This inference follows from the wording of Section 23-C(2). It mentions director, who may be a party to the policy being followed by a company and yet not be in-charge of the business of the company. Further it mentions manager, who usually

> is in charge of the business but not in overall charge. Similarly the other officers may be in charge of only some part of business." (emphasis supplied)

It, therefore, follows that merely being a director of a company cannot be the basis to proceed against that person for the offence committed by the company. He should be in charge of and responsible to the company for the conduct of the business of the company at the relevant time. Besides, the offence committed by the company must have been committed with his knowledge or that he had failed to exercise due diligence to prevent the commission of such offence. In addition, it has to be established that the offence has been committed with the consent or connivance of that person or is attributable to any neglect on his part, whether he is director, manager, secretary or other officer of the company, so as to make him liable for being proceeded against and punished for the offence committed by the company. The Apex Court had occasion to consider these aspects as can be noted from the decision in the case of K.P.G. Nair v. Jindal Menthol India Ltd., reported in (2001) 10 S.C.C. 218. In para 8 of this

decision, the Apex Court has observed that from the perusal of section 141, it is evident that in a case where a company committed offence under section 138, then, not only the company, but also every person, who, at the time when the offence was committed, was in charge of and was responsible to the conduct of the business of the company, shall be deemed to be guilty of offence and liable to be proceeded against and punished accordingly. It is further observed that it follows that a person, other than the company, can be proceeded against under those provisions only if that person was in charge of and was responsible to the company for the conduct of its business at the relevant time. In the case of Katta Sujatha (Smt.) v. Fertilizers & Chemicals Travancore Ltd. and another, reported in (2002) 7 S.C.C. 655, the Apex Court noted that the complaint did not specifically attribute any particular act done by the appellant before it. On that basis, the Court proceeded to examine the matter and found that the appellant was in no way involved in any of the transactions referred to in the complaint and it was not stated that the appellant was in charge of and responsible to the

firm for the conduct of the business of the firm in terms of section 141 of the Act, nor was there any other allegation against the appellant that she had connived with any other partner in the matter of issue of cheque. On that finding, the Court proceeded to quash the complaint insofar as the appellant before it, who was partner of the partnership firm, which had committed the offence under section 138 of the Act. Even in the case of Monaben Ketanbhai Shah and another v. State of Gujarat and others, reported in (2004) 7 S.C.C. 15, the Apex Court observed as follows :

> " 3. Section 138 of the Act makes dishonour of the cheque an offence punishable with imprisonment or fine or both. Section 141 relates to offences by the company. It provides that if the person committing an offence under Section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. Thus, vicarious liability has been fastened on those who are in charge of and responsible to the company for the conduct of its business. For the purpose of Section 141, a firm comes within the ambit of a company.
>
> 4. It is not necessary to reproduce the language of Section 141 verbatim in the complaint since the complaint is required

> to be read as a whole. If the substance of the allegations made in the complaint the requirements of Section 141, the complaint has to proceed and is required to be tried with. It is also true that in construing a complaint, a hypertechnical approach should not be adopted so as to quash the same. The laudable object of preventing bouncing of cheques and sustaining the credibility of commercial transactions resulting in enactment of Sections 138 and 141 has to be borne in mind. These provisions create a statutory presumption of dishonesty, exposing a person to criminal liability if payment is not made within the statutory period even after issue of notice. It is also true that the power of quashing is required to be exercised very sparingly and where, read as a whole, actual foundation for the offence has been laid in the complaint, it should not be quashed. All the same, it is also to be remembered that it is the duty of the court to discharge the accused if taking everything stated in the complaint as correct and construing the allegations made therein liberally in favour of the complainant, the ingredients of the offence are altogether lacking. The present case falls in this category as would be evident from the facts noticed hereinafter."
>
> (emphasis supplied)

The Apex Court then went on to consider the averments in the complaint and noted that there are no averments in the complaint that the appellants have taken active interest in the business except stating in the title that they are partners of the firm. In para 6, the Apex

Court has observed thus :

> "6. From the above, it is evident that in the complaint there are no averments against the appellants except stating in the title that they are partners of the firm. Learned counsel for the respondent complainants contended that a copy of the partnership deed was also filed which would show that the appellants were active in the business. No such document was filed with the complaint or made part thereof. The filing of the partnership deed later is of no consequence for determining the point in issue. Section 141 does not make all partners liable for the offence. The criminal liability has been fastened on those who, at the time of the commission of the offence, were in charge of and were responsible to the firm for the conduct of the business of the firm. These may be sleeping partners who are not required to take any part in the business of the firm; they may be ladies and others who may not know anything about the business of the firm. The primary responsibility is on the complainant to make necessary averments in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every partner knows about the transaction. The obligation of the appellants to prove that at the time the offence was committed they were not in charge of and were not responsible to the firm for the conduct of the business of the firm, would arise only when first the complainant makes necessary averments in the complaint and establishes that fact. The present case is of total absence of requisite averments in the complaint."
>
> (emphasis supplied)

The decision of the Apex Court in Monaben's case (supra) is not only an authority on the requirements of section 141 of the Act, but also about the necessity of the requisite averments to be made in the complaint so as to indicate the complicity of a person for making him liable for offence committed by the company or the partnership firm. The primary responsibility is on the complainant to make necessary averments in the complaint so as to make the accused vicariously liable and also to establish those facts. In the case of Katta Sujatha (supra), the Apex Court quashed the criminal complaint insofar as the appellant before it was concerned, as no specific allegation attributing any particular act done by the appellant was stated in the complaint as filed. Similar was the approach adopted in K.P.G.Nair's case (supra). In other words, the requirements of section 141 of the Act indicating the complicity of the person in respect of offence committed by the company or the partnership firm will have to be clearly spelt out in the complaint. Mere reproduction of the language of the section is not enough. Same principle has been adopted even by our High Court

in the cases of H.M. Dave v. Gitanjali Shah & anr. reported in 1998 (4) LJ 830; and Chaitan M. Maniar v. State of Maharashtra and another, reported in 2004 (2) Mh.L.J. 1035. It may be useful to refer to the recent unreported decision in the case of Madanlal Taparia and Anr. v. The Bank of Rajasthan Ltd. & Anr. in Criminal Writ Petition No. 2241 of 2004 decided on December 14, 2004.

06. That brings me to the question as to whether in the present case, the averments in the complaint are sufficient to indicate the complicity of the Applicant in the commission of offence committed by the accused Company. As mentioned earlier, even on a fair reading of the complaint as a whole, what can be discerned is that the Applicant, accused No. 2, is the Chairman of accused No. 1 Company and further that all the accused are in charge of and responsible for the conduct of business of the accused No. 1 Company. This, by no standards, is sufficient to indicate the complicity of the Applicant herein in relation to the offence committed by the accused Company. It is relevant

to note that it is common ground that the Applicant was not the signatory to the cheques in question. In similar fact situation, the Apex Court in the case of K.P.G. Nair (supra) observed that the words of section 141 need not be incorporated in the complaint as magic words but substance of the allegations read as a whole should answer and fulfil the requirements of the ingredients of the said provision for being proceeded against for an offence which the accused is alleged to have committed. Similar approach was adopted by the Apex Court in the case of Katta Sujatha (supra), where the complaint did not specifically attribute any particular act done by the appellant before it. Even in the case of Monaben (supra), the Apex Court observed that there was no allegation in the complaint that the appellants have taken active interest in the business. It is further observed that the primary responsibility is on the complainant to make necessary averments in the complaint so as to make the accused vicariously liable as there can be no presumption of criminal liability that other partner knows about the transaction. In the present case,

there is no specific assertion in the complaint as filed that the Applicant herein had knowledge about the issuance of cheque and in particular that he was in charge of and responsible to the company for the conduct of the business of the company at the time when the offence was committed or that the offence was committed with his consent or connivance or attributable to any neglect on his part. In other words, no material facts have been provided in the complaint as filed with regard to the requirements of section 141 of the Act so as to make the Applicant herein liable for the offence committed by the Accused Company. Even the allegation contained in para 7 of the complaint that inspite of receipt of the legal notice sent to the accused, they have failed and neglected to make the payment within 15 days from the receipt of notice or till the date of the filing of the complaint towards dishonoured cheque, taken as it is, does not fulfil the requirements of section 141 of the Act, so as to make the Applicant liable for the offence committed by the accused Company.

07. To get over this position, Counsel for

the Respondent No. 2 had placed reliance on the decision of our High Court in the case of P. Rajarathinam v. State of Maharashtra and others reported in 2001 (105) Company Cases 625. The conclusion reached in that decision is on the basis of the fact situation of that case. In that case, the Court has observed that on reading the complaint as a whole, it was not a case of bald statement regarding the role of the directors. In that case, the Court has recorded a finding that on reading the complaint as a whole, and the verification statement, the complainant has specifically given the essential ingredients of section 141 of the Act. That decision will be of no avail to the fact situation of the present case, which, in fact, would be governed by the principle enunciated in the decisions already referred to earlier.

08. Counsel for the Respondent No. 2 then placed reliance on the decision of the Delhi High Court in the case of K.P.G. Nair v. Jindal Menthol India Ltd., reported in 2000 (99) Company Cases 519. Reliance placed on this judgment is ill-advised, for this judgment has been reversed

by the Apex Court in the decision reported in 2001 (10) S.C.C. 218. Reliance was also placed on the decision in the case of Sanjeev R. Apte v. Govt. of NCT of Delhi & ors., reported in 2002 (4) Crimes 328. Even this decision will be of no avail to the Respondent No. 2 having regard to the fact situation of the present case. In this case, the Court has on reading the complaint as a whole found as of fact that necessary ingredients of section 141 were spelt out from the complaint as filed. On this basis, the Delhi High Court distinguished the Supreme Court judgment in K.P.G. Nair's case (supra) as can be seen from the discussion in para 11 of this decision. Whereas, I have already taken the view that the present case is squarely covered by the principles in the decisions already referred to earlier.

09. Learned Counsel for the Respondent No. 2 complainant, in addition to the allegations in the complaint, placed emphasis on the averments in the affidavit in reply and the documents accompanying thereto, to contend that there is enough material to indicate the complicity of the

Applicant in relation to the offence committed by the accused Company. However, it is not possible to look into the materials which do not form part of the complaint as filed and the verification statement. In other words, whether the complaint as filed should proceed against the Applicant will have to be determined on the basis of the allegations in the complaint and not on the basis of the materials, which do not form part of the complaint as filed, or, the verification statement. This legal position is well-settled. In the case of Monaben (supra), the Apex Court had occasion to observe that filing of the partnership deed later on is of no consequence for determining the point in issue, as can be seen from the observations in para 6 of the said decision. Accordingly, it is not necessary to elaborate on the materials, which are now relied on by the Respondent No. 2 for the first time before this Court.

10. In view of the above discussion, I have no hesitation in taking the view that the complaint as filed does not indicate the complicity of the Applicant in relation to the

offence committed by the accused Company, as is required by section 141 of the Act; and if it is so, the complaint cannot be allowed to proceed against the Applicant herein.

11. That takes me to the last aspect, which was streneously canvassed before me on behalf of the Applicant. According to the Applicant, the Applicant had already resigned as director of the accused company on the date when the cheque was presented and dishonoured and the legal notice issued. To establish this fact, reliance was placed on Form No. 32 submitted to the Registrar of Companies intimating that the Applicant had ceased to be the director of the company with effect from 2nd April 2001. In other words, it was submitted that no offence is made out as against the Applicant who was not the director on the relevant date when the offence is alleged to have been committed by the accused Company. This submission, however, clearly overlooks that the factum whether the Applicant continued to be the director of the accused Company on the relevant date is a matter for trial to be established on adduction of evidence in that behalf. However,

according to the Counsel for the Applicant, Form No. 32 by itself is sufficient to establish that fact and the Court can proceed to quash the complaint on that basis. To buttress this submission, reliance was placed on the decisions of our High Court reported in 1998 (4) LJ 654 (in the case of Kusum A. Bardeskar & ors. v. Babulal Tarachand Shah & anr.); 2001 (1) Mh.L.J. 701 (in the case of Dushyant D. Anjaria v. M/s. Wall Street Finance Ltd. and another); 2004 (2) Mh.L.J. 1035 (in the case of Chaitan M. Maniar v. State of Maharashtra and another); (2002) 2 Mh.L.J. 36 (Division Bench) (in the case of Saumil Dilip Mehta v. State of Maharashtra and others); and 1998 (4) LJ 830 (in the case of H.M. Dave v. Gitanjali Shah & anr.). In my opinion, however, none of these decisions are authority on the proposition which is canvassed before me. In the case of Kusum Bardeskar (supra), it appears that there was no dispute at least about the resignation of petitioner No. 2 as director of the company. The correctness of Form No. 32 was not put in issue. It is on that basis the Court proceeded to quash the criminal action only against the petitioner No. 2 therein

relying on Form No. 32. In the case of Dushyant Anjaria (supra), it is seen that the complainant had not specifically denied in their reply about the averment made in the petition in para 2 of the application that the applicant had tendered his resignation as director of the company on 2-12-1992. This position can be discerned from the observations made in para 8 of the decision. It is on that basis the Court proceeded to consider the case before it. In any case the Court has not rested its decision only on the basis of Form No. 32, but went on to further observe that the petitioner before it was a co-opted additional director whose term was to come to an end on 30th April 1992 and his tenure could not have exceeded beyond that date, whereas the cheque in question was of a later date. On that basis, the Court proceeded to quash the criminal action against the said petitioner. In the case of Chaitan M. Maniar (supra), the Court essentially quashed the complaint on the findings that there was no specific averment in the complaint about the role played by the petitioner therein who was the non-executive director of the accused Company; Moreover, no legal notice was

served on the petitioner. The Court has incidentally referred to the fact that the petitioner had already resigned before issuance of the cheque in question. In other words, it is not an authority on the proposition that even when the correctness of Form No. 32 is put in issue, the Court can proceed to quash the complaint solely relying on that document. In the case of Saumil Mehta (supra), indeed, the Division Bench of this Court proceeded to decide the issue before it relying on Form No. 32 to hold that the petitioner had tendered his resignation and ceased to be director, for which reason, could not be made liable for the liability incurred by the company after the date of acceptance of his resignation. However, the Court had no occasion to consider the proposition as to whether the factum of resignation will have to be established at the trial when disputed, as is the situation in the present case. Even the case of H.M. Dave (supra) is not an authority on the proposition that even when the correctness of Form No. 32 is put in issue, the Court can proceed on the assumption that the petitioner before it had ceased to be a director on the

relevant date. Whereas, in cases where the factum of resignation or for that matter thecorrectness of Form No. 32 is in dispute, that fact will necessarily have to be proved at the trial by adducing evidence in that regard, is the view taken in the decision reported in 1999 (3) Mh.L.J. 853 in the case of Bharati N. Wadhwana and others v. Arjun Kishandas Jaisingh and another. Similar is the view taken by this Court in the case of P. Rajarathinam v. State of Maharashtra and others, reported in 2001 (105) Company Cases 632 (at page 637- last paragraph). It will be useful to advert to the dictum of the Apex Court in the case of V.K. Jain v. Union of India reported in 2000 (1) S.C.C. 709. In para 1, the Apex Court observed that the plea that the Petitioner was not participating in the affairs of the company, which issued the cheques is a defence, which he can adopt in the prosecutions and cannot be a ground for quashing prosecutions. It will be also useful to refer to the decision of our High Court in the case reported in A.I.R. 1983 Bom. 1, Om Prakash Berlia and another v. Unit Trust of India and others, and more importantly on the decision of our High Court in

the case of Pandurang Comotim Sancoalcar v. Suresh Prabhakar Prabhu reported in 2001 Cri.L.J. 2945 (see paras 46 and 56) and of the Andhra Pradesh High Court reported in 1999 (3) ALL MR (JOURNAL) 5, in the case of Bharat Kumar Modi and others v. Pennar Paterson Securities Ltd., Hyderabad and others, which are directly on the point in issue. Applying the principle deduced from the abovesaid decisions, I am not inclined to accept the argument of the Applicant that the complaint ought to be quashed solely relying on Form No. 32, which would indicate that the Applicant had ceased to be the director of the accused Company at the relevant time, for the complainant in the present case is disputing the factum of resignation in the reply filed before this Court. In such a case, the accused will have to establish the factum of resignation at the trial by adduction of evidence in that behalf.

12. Be that as it may, as I have already taken the view that the complaint as filed does not indicate the complicity of the Applicant in relation to the offence committed by the accused

Company as required by section 141 of the Act: Therefore, the complaint cannot be allowed to proceed as against the Applicant herein.

13. Accordingly, this Criminal Application ought to succeed in terms of prayer clause (a) and (b). The criminal action is quashed insofar as the Applicant herein - Accused No. 2 only. Ordered accordingly.

(A.M.KHANWILKAR,J.)

IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 4828 OF 2004

WITH

CRIMINAL APPLNS. NOS. 4829 & 4830 OF 2004.

Vijay Mallya ... Applicant

versus

State of Maharashtra & anr ... Respondents

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Mr. Shirish Gupte, with Mr. A.P. Mundargi, with
Mr. Subodh Desai, i/by
M/s. Bachubhai Munim & Co., for the Applicant.
Mr. A.S. Gadkari, A.P.P., for Respondent No.1.
Mr. P.M. Gaonkar, for Respondent No. 2.

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CORAM : A.M.KHANWILKAR,J.

23rd December 2004

P.C.:

. It is agreed that for the reasons recorded in order in Criminal Application No. 4827 of 2004, these applications ought to succeed in terms of prayer clauses (a) and (b), as the

parties are common and the contents of the complaints, as filed, are also identical. Ordered accordingly.

(A.M.KHANWILKAR,J.)

IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CRIMINAL APPELLATE JURISDICTION

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...

Mr. A.P. Mundargi, with Mr. Subodh Desai, i/by M/s. Bachubhai Munim & Co., for the Applicant.

Mr. A.S. Gadkari, A.P.P., for Respondent No.1.

Mr. P.M. Gaonkar, for Respondent No. 2.

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CORAM : A.M.KHANWILKAR,J.

14th December 2004

P.C.:

. Judgment prounounced, allowing the applications.